



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
17 STATE HOUSE STATION AUGUSTA, MAINE 04333-0017

DEPARTMENT ORDER

IN THE MATTER OF

TOWN OF ROCKPORT) MANDATORY SHORELAND ZONING ACT
KNOX COUNTY)
SHORELAND ZONING ORDINANCE)
AND MAP)
ORDER #53-2021) CONDITIONAL APPROVAL

Pursuant to the provisions of 38 M.R.S. §§ 435-448, the *Mandatory Shoreland Zoning Act* (“Act”), and the Maine Department of Environmental Protection’s *Guidelines for Municipal Shoreland Zoning Ordinances*, 06-096 C.M.R. ch. 1000 (amended January 26, 2015) (“Guidelines”), the Department of Environmental Protection has considered the request for approval of the Town of Rockport Shoreland Zoning Ordinance (Ordinance) and Shoreland Zoning Map (Map), as amended on June 8, 2021, and FINDS THE FOLLOWING FACTS:

1. The Act requires municipalities to establish zoning controls in areas within 250 feet of the normal high-water line of great ponds and rivers; within 250 feet of the upland edge of freshwater and coastal wetlands; and within 75 feet of the normal high-water line of streams. Such zoning standards must be consistent with or no less restrictive than those in the Guidelines. 38 M.R.S. §§435 & 438-A.
2. The Act specifies that before a locally adopted shoreland zoning ordinance, or amendment to that ordinance, is effective, it must be approved by the Commissioner of the Department of Environmental Protection (“Commissioner”). The Commissioner may approve, approve with conditions, or deny the ordinance or amendment. If denied, or approved with conditions, such action must be preceded by notice to the municipality. If the Commissioner fails to act within 45 days of receipt of the ordinance or amendment, then the ordinance or amendment is automatically approved. 38 M.R.S. § 438-A.
3. On November 22, 2021, the Town of Rockport submitted the following amendments to its Ordinance and Map as adopted on June 8, 2021 to the Department for review:
 - A. The amendments to the Town’s Ordinance, as they relate to adoption of the statewide timber harvesting standards establish the Town as option one for timber harvesting,¹ deferring all administration and regulation of all forestry activities within the municipality to the Bureau of Forestry (also commonly referred to as the Maine Forest Service), are consistent with the minimum requirements of the Chapter 1000 Guidelines.

¹ Title 38, section 438-A provides that, notwithstanding other provisions in the Mandatory Shoreland Zoning Act, the regulation of timber harvesting and timber harvesting activities in shoreland areas must be in accordance with section 438-B and rules adopted by the Bureau of Forestry. Section 438-B establishes three options from which each municipality may choose. The options are further identified in a Note Relating to Timber Harvesting Standards, located in the Guidelines between Ch. 1000, § 15(N) and § 15(O-1).

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- B. The amendments make extensive revisions throughout the Ordinance, including minor corrections and clarifications, as well as substantive changes in standards including, but not limited to: expansion of nonconforming structures, lot coverage, shoreline stabilization projects, hazard and storm damaged tree removal, revegetation requirements, and associated definitions. The submitted amendments update the Ordinance and are intended to bring it into compliance with the Guidelines as amended on January 26, 2015.
 - C. Amendments to the Map, were made to reflect the current district designations.
4. The Department's review of the Ordinance has revealed the following significant deficiency:
- A. Chapter 1400 Section **1412. Non-Conformance** E.3 *Contiguous Lots Vacant or Partially Built* fails to establish the effective date of a lot being in existence. The correct effective date that applies to this section is June 11, 1996 and must be specified in Section 1412.E.3.
 - B. Chapter 300 **Definitions** Section 301 *Meaning of Words* fails to include the following terms ***Disability, Non-native invasive species of vegetation, Outlet stream, Sapling, Seedling, and Tree.***
 - C. Chapter 300 **Definitions** Section 301 *Meaning of Words* fails to have the correct definition for the following terms ***Expansion of a structure, Expansion of Use, Non-conforming Structure, Principal Structure, Principal Use, Stream, Structure, Timber Harvesting, Upland Edge of a Wetland, and Coastal Wetland.***
5. On December 9, 2021, the Town of Rockport was notified by the Department of the above deficiency, and the proposed conditional approval of the Ordinance.

BASED on the above Findings of Fact, the Commissioner makes the following CONCLUSION:

- 1. The deficiencies noted in paragraph 4 above can be addressed by the Commissioner approving the Ordinance with conditions. This will result in the Ordinance being substantially consistent with the requirements of the Mandatory Shoreland Zoning Act, 38 M.S.R., Section 438-A, and the minimum Guidelines. Additionally, the Town of Rockport has not yet adopted the photographic record requirement established in 38 M.R.S. § 439-A(10).

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THEREFORE, the Commissioner APPROVES the Ordinance and Map, as amended on June 8, 2021, SUBJECT TO THE ATTACHED CONDITIONS:

1. Section **1412. Non-Conformance** E.3 *Contiguous Lots Vacant or Partially Built* shall be amended in part to include the proper effective date as follows:

(3) *Contiguous Lots - Vacant or Partially Built: If two or more contiguous lots or parcels are in single or joint ownership of record at the time of or since adoption or amendment of this Ordinance, if any of these lots do not individually meet the dimensional requirements of this Ordinance or subsequent amendments, and if one or more of the lots are vacant or contain no principal structure the lots shall be combined to the extent necessary to meet the dimensional requirements.*

*This provision shall not apply to 2 or more contiguous lots, at least one of which is non-conforming, owned by the same person or persons on **June 11, 1996** and recorded in the registry of deeds if the lot is served by a public sewer or can accommodate a subsurface sewage disposal system in conformance with the State of Maine Subsurface Wastewater Disposal Rules; and*

(a) *Each lot contains at least 100 feet of shore frontage and at least 20,000 square feet of lot area; or*

(b) *Any lots that do not meet the frontage and lot size requirements of Section 12(E)(3)(a) are reconfigured or combined so that each new lot contains at least 100 feet of shore frontage and 20,000 square feet of lot area.*

2. Chapter 300 **Definitions** Section 301 *Meaning of Words* shall be amended by adding the following terms and associated definitions:

Disability - *any disability, infirmity, malformation, disfigurement, congenital defect or mental condition caused by bodily injury, accident, disease, birth defect, environmental conditions or illness; and also includes the physical or mental condition of a person which constitutes a substantial handicap as determined by a physician or in the case of mental handicap, by a psychiatrist or psychologist, as well as any other health or sensory impairment which requires special education, vocational rehabilitation or related services.*

Non-native invasive species of vegetation - *species of vegetation listed by the Maine Department of Agriculture, Conservation and Forestry as being invasive in Maine ecosystems and not native to Maine ecosystems.*

Outlet stream - *any perennial or intermittent stream, as shown on the most recent highest resolution version of the national hydrography dataset available from the United States Geological Survey on the website of the United States Geological Survey or the national map, that flows from a freshwater wetland.*

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Sapling - a tree species that is less than two (2) inches in diameter at four and one half (4.5) feet above ground level.

Seedling - a young tree species that is less than four and one half (4.5) feet in height above ground level.

Tree - a woody perennial plant with a well-defined trunk(s) at least two (2) inches in diameter at four and one half (4.5) feet above the ground, with a more or less definite crown, and reaching a height of at least ten (10) feet at maturity.

3. Chapter 300 **Definitions** Section 301 *Meaning of Words* shall be amended shall be amended to include the following (~~Strikethrough~~ to be removed Underlined to be added):

Expansion of a Structure: An increase in the ~~floor area or volume~~ footprint or height of a structure, including all extensions such as, but not limited to, decks, garages, porches and greenhouses.

Expansion of Use: The addition of weeks or months to a use's operating season; additional hours of operation; or the use of more ~~floor area~~ footprint or ground area devoted to a particular use.

Nonconforming Structure: A structure that does not meet the setback, lot coverage, height, footprint or, if applicable, unit size standards of the District in which it is located. It is allowed solely because it was in lawful existence at the time this Ordinance or subsequent amendments took effect.

Principal Structure: A ~~building~~ structure other than one that is used for purposes wholly incidental or accessory to the use of another structure or use on the same ~~premises~~ lot.

Principal Use: A use other than one that is wholly incidental or accessory to another use on the same ~~premises~~ lot.

Stream: A free-flowing body of water from the outlet of a great pond or the confluence of two (2) perennial streams as depicted on the most recent ~~edition of a United States Geological Survey 7.5 minute series topographic map, or if not available, a 15-minute series topographic map, to the point where the body of water becomes a river or flows to another water body or wetland within the Shoreland area.~~ highest resolution version of the national hydrography dataset available from the United States Geological Survey on the website of the United States Geological Survey or the national map to the point where the stream becomes a river or where the stream meets the shoreland zone of another water body or wetland. When a stream meets the shoreland zone of a water body or wetland and a channel forms downstream of the water body or wetland as an outlet, that channel is also a stream.

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Structure: ~~Anything built for the support, shelter or enclosure of persons, animals, goods or property of any kind, together with anything constructed or erected with a fixed location on or in the ground, exclusive of fences, foundation drains, poles, wiring and other aerial equipment normally associated with service drops as well as guying and guy anchors. The term includes structures temporarily or permanently located, such as decks, patios, wind turbines and satellite dishes. anything temporarily or permanently located, built, constructed or erected for the support, shelter or enclosure of persons, animals, goods or property of any kind or anything constructed or erected on or in the ground. The term includes structures temporarily or permanently located, such as decks, patios, and satellite dishes. Structure does not include fences; poles and wiring and other aerial equipment normally associated with service drops, including guy wires and guy anchors; subsurface waste water disposal systems as defined in Title 30-A, section 4201, subsection 5; geothermal heat exchange wells as defined in Title 32, section 4700-E, subsection 3-C; or wells or water wells as defined in Title 32, section 4700-E, subsection 8.~~

Timber Harvesting: The cutting and removal of timber for the primary purpose of selling or processing forest products. “Timber harvesting” does not include the cutting or removal of vegetation within the shoreland zone when associated with any other land use activities. The cutting or removal of trees in the Shoreland zone on a lot that has less than two (2) acres within the Shoreland zone shall not be considered timber harvesting. Such cutting or removal of trees shall be regulated pursuant to Section 1415.16, Clearing or Removal of Vegetation for Activities Other than Timber Harvesting.

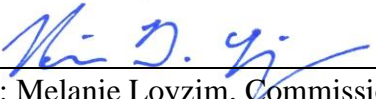
Upland Edge of a Wetland: The boundary between upland and wetland. For purposes of a coastal wetland, this boundary is the line formed by the landward limits of the salt tolerant vegetation and/or ~~the maximum spring tide~~ highest annual tide level, including all areas affected by tidal action. For purposes of a freshwater wetland, the upland edge is formed where the soils are not saturated for a duration sufficient to support wetland vegetation; or where the soils support the growth of wetland vegetation, but such vegetation is dominated by woody stems that are six (6) meters (approximately twenty (20) foot) tall or taller.

Coastal Wetland: All tidal and sub tidal lands; all lands below any identifiable debris line left by tidal action; all lands with vegetation present that is tolerant of salt water and occurs primarily in a salt water or estuarine habitat; and any swamp, marsh, bog, beach, flat or other contiguous low land which is subject to tidal action during the ~~maximum spring tide~~ highest annual tide level for the year in which an activity is proposed as identified in tide tables published by the National Ocean Service. Coastal wetlands may include portions of coastal sand dunes. **Note:** All areas below the ~~maximum spring tide~~ highest annual tide level are coastal wetlands. These areas may consist of rocky ledges, sand and cobble beaches, mud flats, etc., in addition to salt marshes and salt meadows.

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DONE AND DATED AT AUGUSTA, MAINE, THIS 4TH DAY OF JANUARY, 2022.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY: 
For: Melanie Loyzim, Commissioner

PLEASE NOTE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES.

FILED
January 4th, 2022
State of Maine
Board of Environmental Protection



DEP INFORMATION SHEET

Appealing a Commissioner's Decision on a Shoreland Zoning Ordinance

Dated: August 2021

Contact: (207) 314-1458

SUMMARY

This document provides information regarding a municipality's rights and obligations in filing an administrative or judicial appeal of a shoreland zoning ordinance decision made by the Department of Environmental Protection's (DEP) Commissioner.

There are two methods available to a municipality seeking to appeal a shoreland zoning ordinance decision made by the DEP Commissioner: (1) an administrative process before the Board of Environmental Protection (Board), or (2) a judicial process before Maine's Superior Court.

I. ADMINISTRATIVE APPEALS TO THE BOARD

LEGAL REFERENCES

A municipality filing an appeal to the Board should review [38 M.R.S. §§ 341-D\(4\)](#) and [346](#), the Mandatory Shoreland Zoning laws [38 M.R.S. § 438-A\(3\)](#), and the DEP's [Rule Concerning the Processing of Applications and Other Administrative Matters \(Chapter 2\)](#), 06-096 C.M.R. ch. 2.

DEADLINE TO SUBMIT AN APPEAL TO THE BOARD

Not more than 30 days following the filing of a license decision by the Commissioner with the Board, a municipality may appeal to the Board for review of the Commissioner's decision. The filing of an appeal with the Board, in care of the Board Clerk, is complete when the Board receives the submission by the close of business on the due date (5:00 p.m. on the 30th calendar day from which the Commissioner's decision was filed with the Board, as determined by the received time stamp on the document or electronic mail). Appeals filed after 5:00 p.m. on the 30th calendar day from which the Commissioner's decision was filed with the Board will be dismissed as untimely, absent a showing of good cause.

HOW TO SUBMIT AN APPEAL TO THE BOARD

An appeal to the Board may be submitted via postal mail or via electronic mail and must contain all signatures and required appeal contents. An electronic filing must contain the scanned original signature of the appellant(s). The appeal documents must be sent to the following address.

Chair, Board of Environmental Protection
c/o Board Clerk
17 State House Station
Augusta, ME 04333-0017
ruth.a.burke@maine.gov

The DEP may also request the submittal of the original signed paper appeal documents when the appeal is filed electronically. The risk of material not being received in a timely manner is on the sender, regardless of the method used.

At the time an appeal is filed with the Board, the appellant must send a copy of the appeal to the Commissioner of the DEP (Maine Department of Environmental Protection, 17 State House Station, Augusta, Maine 04333-0017). Please contact the DEP at 207-287-7688 with questions or for contact information regarding a specific licensing decision.

REQUIRED APPEAL CONTENTS

A complete appeal must contain the following information at the time the appeal is submitted.

1. *Aggrieved status.* The appeal must demonstrate that it is submitted on behalf of the municipality subject to the Commissioner's decision and must explain how the municipality may suffer a particularized injury as a result of the Commissioner's decision.
2. *The findings, conclusions or conditions objected to or believed to be in error.* The appeal must identify the specific findings of fact, conclusions regarding compliance with the law, conditions, or other aspects of the written decision or of the review process that the appellant objects to or believes to be in error.
3. *The basis of the objections or challenge.* For the objections identified in Item #2, the appeal must state why the appellant believes that the decision is incorrect and should be modified or reversed. If possible, the appeal should cite specific evidence in the record or specific criteria that the appellant believes were not properly considered or fully addressed.
4. *The remedy sought.* This can range from reversal of the Commissioner's decision on the shoreland zoning ordinance to changes in specific conditions imposed on the shoreland zoning ordinance.
5. *All the matters to be contested.* The Board will limit its consideration to those matters specifically raised in the written notice of appeal.
6. *Request for hearing.* If the appellant wishes the Board to hold a public hearing on the appeal, a request for public hearing must be filed as part of the notice of appeal, and it must include an offer of proof regarding the testimony and other evidence that would be presented at the hearing. The offer of proof must consist of a statement of the substance of the evidence, its relevance to the issues on appeal, and whether any witnesses would testify. The Board will hear the arguments in favor of and in opposition to a hearing on the appeal and the presentations on the merits of an appeal at a regularly scheduled meeting. If the Board decides to hold a public hearing on an appeal, that hearing will then be scheduled for a later date.
7. *New or additional evidence to be offered.* If an appellant wants to provide evidence not previously provided to DEP staff during the DEP's review of the ordinance, the request and the proposed supplemental evidence must be submitted with the appeal. The Board may allow new or additional evidence, to be considered in an appeal only under very limited circumstances. The proposed supplemental evidence must be relevant and material, and (a) the person seeking to add information to the record must show due diligence in bringing the evidence to the DEP's attention

at the earliest possible time in the review process; or (b) the evidence itself must be newly discovered and therefore unable to have been presented earlier in the process. Requirements for supplemental evidence are set forth in [Chapter 2 § 24](#).

OTHER CONSIDERATIONS IN APPEALING A DECISION TO THE BOARD

1. *Be familiar with all relevant material in the DEP record.* A municipal shoreland zoning file is public information made accessible by DEP. Upon request, the DEP will make the material available to review and photocopy during normal working hours. There may be a charge for copies or copying services.
2. *Be familiar with the regulations and laws under which the shoreland zoning ordinance was processed, and the procedural rules governing the appeal.* DEP staff will provide this information upon request and answer general questions regarding the appeal process.
3. *The filing of an appeal does not operate as a stay to any decision.* A municipality proceeding with shoreland zoning matters pending the outcome of an appeal runs the risk of the decision being reversed or modified as a result of the appeal.

WHAT TO EXPECT ONCE YOU FILE A TIMELY APPEAL WITH THE BOARD

The Board will acknowledge receipt of an appeal, and it will provide the name of the DEP shoreland zoning staff member assigned to the specific appeal. The notice of appeal, any materials admitted by the Board Chair as new or supplemental evidence, any materials admitted in response to the appeal, relevant excerpts from the DEP's administrative record for the ordinance review, and the DEP staff's recommendation, in the form of a proposed Board Order, will be provided to Board members. The appellant and parties of record are notified in advance of the date set for Board consideration of an appeal or request for public hearing. The appellant will have an opportunity to address the Board at the Board meeting. The Board will decide whether to hold a hearing on appeal when one is requested before deciding an appeal. The Board's decision on appeal may be to affirm all or part, affirm with conditions, order a hearing to be held as expeditiously as possible, reverse all or part of the decision of the Commissioner, or remand the matter to the Commissioner for further proceedings. The Board will notify the appellant and parties of record of its decision on appeal.

II. APPEALS TO MAINE SUPERIOR COURT

Maine law generally allows aggrieved persons to appeal final Commissioner or Board decisions to Maine's Superior Court (see [38 M.R.S. § 346\(1\)](#); 06-096 C.M.R. ch. 2; [5 M.R.S. § 11001](#); and M.R. Civ. P. 80C). Parties to the shoreland zoning ordinance decision must file a petition for review within 30 days after receipt of notice of the Commissioner's or Board's decision. The laws cited in this paragraph and other legal procedures govern the contents and processing of a Superior Court appeal. The filing of an appeal to the Board is not a prerequisite for a judicial appeal.

Maine's Administrative Procedure Act, DEP statutes governing a particular matter, and the Maine Rules of Civil Procedure must be consulted for the substantive and procedural details applicable to judicial appeals.

ADDITIONAL INFORMATION

If you have questions or need additional information on the appeal process, for administrative appeals contact the Board Clerk at 207-287-2811 or the Board Executive Analyst at 207-314-1458 bill.hinkel@maine.gov, or for judicial appeals contact the court clerk's office in which the appeal will be filed.

Note: This information sheet, in conjunction with a review of the statutory and regulatory provisions referred to herein, is provided to help a person to understand their rights and obligations in filing an administrative or judicial appeal. The DEP provides this INFORMATION SHEET for general guidance only; it is not intended for use as a legal reference. Maine law governs an appellant's rights.
